



U.S. Citizenship
and Immigration
Services

B6

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

JUN 22 2004

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

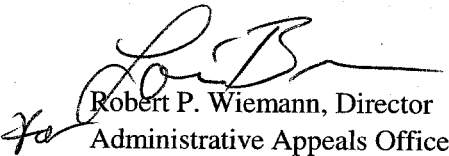
ON BEHALF OF PETITIONER:

[REDACTED]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a family restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and evidence previously submitted.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.71 per hour, which amounts to \$24,356.80 annually.

With the petition, the petitioner submitted its owner's Schedule C, Profit or Loss from Business for 2001 reflecting gross receipts of \$119,430.78; gross profit of \$28,488.78; wages paid of \$18,980.00; and net loss from business of \$17,082.00.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 31, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide a copy of its 2002 federal tax return, copies of W-2 forms for each employee in 2001 and 2002, copies of the petitioner's bank statements, and any other documents which would demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted the petitioner's owner's Form 1040 U.S. Individual Income Tax Return for 2002 including its Schedule C Profit or Loss from Business. The tax return reflects the following information:

	<u>2002</u>
Sole Proprietor's adjusted gross income (Form 1040)	\$30,090.03
Petitioner's gross receipts or sales (Schedule C)	\$122,602.00
Petitioner's gross profit (Schedule C)	\$39,054.00
Petitioner's wages paid (Schedule C)	\$18,980.00
Petitioner's net loss from business (Schedule C)	\$10,234.00

In addition, counsel submitted copies of the petitioner's checking account statements for the period January 29, 2001 through March 27, 2003; the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2001 and 2002; and Forms W-2, Wage and Tax Statements that the petitioner issued to employees in 2001 and 2002. The Forms W-2 do not show that the petitioner paid any wages to the beneficiary during 2001 and 2002. The bank statements show ending balances ranging from a low of \$759.51 to a high of \$7,676.09.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 8, 2003, denied the petition. The director stated the following:

Schedule C of the owner of the petitioner's 2001 tax return indicates that the gross income was \$28,488. The wages paid were \$18,980. The petitioner suffered a loss of \$17,082 for the year. Schedule C of the owner of the petitioner's 2002 tax return indicates that the gross income was \$39,054. The wages paid were \$18,980. The petitioner suffered a loss of \$10,234 for the year.

The bank statements for 2001 show an ending balance between \$1,565 and \$7,676. The bank statements for 2002 show an ending balance of \$904 and \$4,023. The W-2 forms show that the beneficiary has not been previously employed by the petitioner.

The petitioner has not paid more than \$19,000 in wages per year for the last two years. Paying the beneficiary the proffered wage would more than double that amount. The petitioner has incurred a significant loss for the last two years. The tax returns do not establish the petitioner's ability to pay the proffered wage. The bank statements do not show an ending balance equal to or greater than the proffered wage. The documents submitted do not clearly establish that [the petitioner] has the ability to pay the beneficiary the proffered wage. Thus, [CIS] is not convinced that the petitioner has had, has now or will have the ability to pay the beneficiary the proffered wage.

On appeal, counsel asserts the following:

Although [the p]etitioner has suffered a loss of \$17,082.00 for the year of 2001 and a loss of \$10,234.00 in the year of 2002 [sic], does not indicate that the [p]etitioner cannot pay the proffered wage. If you calculate the weekly pay for the beneficiary, it amounts to a weekly **gross income** of \$468.40, which the [p]etitioner can easily pay. Furthermore, between the years of 2001 and 2002, the [p]etitioner increased its sales by \$10,566.00. Therefore, it is fair to say that the gross annual income fluctuates significantly every year. The fact that the [p]etitioner suffered losses in 2001 and 2002, does not mean that the [p]etitioner cannot pay proffered wages. The [p]etitioner has been in business for over 30 years in Route 66. The [p]etitioner has been stable and has never re-located. In the year 2001, [the petitioner] made close to \$123,000.00 in sales. Although the bank statements [sic] ending balances fluctuate, the [p]etitioner has money in the bank and has significant capital in the business and daily incoming sales receipts for the business. All of these details should be taken into consideration.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. A sole proprietor must show that he or she can cover their existing business expenses as well as pay the proffered wage. In addition, he or she must show that they can sustain themselves and their dependents.

In *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his

spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the director erred by never requesting the petitioner's owner's complete 2001 federal tax return as well as his monthly expenses. The petitioner's owner supports a family of two. An analysis of 2001 is impossible to do since the record of proceeding does not contain the petitioner's owner's complete 2001 tax return which would evidence the petitioner's owner's adjusted gross income. However, an analysis of 2002 is possible¹. In 2002, the petitioner's owner's adjusted gross income was \$30,090.03 and the proffered wage is \$24,356.80. After paying the beneficiary his salary, it is highly unlikely that a family of two could subsist on \$5,733.23 for the year.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The bank account balances add very little additional income to this assessment. Counsel's vague statements concerning the petitioner's location on Route 66 and its business longevity of thirty (30) years has not been substantiated by objective, independent evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the *continuing* ability to pay the proffered wage beginning on the priority date. The AAO concurs with the director's reasoning in denying the petition and finds negligible error in the director's failure to obtain monthly expenses or a complete 2001 tax return, since the petition would be denied anyway based on the petitioner's financial situation in 2002.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ If 2002 does not produce a favorable result for the petitioner, than an adverse decision may be made since the petitioner has a continuing ability to pay the proffered wage. Thus, if the petitioner cannot illustrate the ability to pay the proffered wage in one year, than an analysis of the other years is not necessary for the result. If, however, 2002 produces a favorable result for the petitioner, then the case would have to be remanded to the director to obtain additional evidence.